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Court of Appeals
Division III
State of Washington

32059-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL W. ROBISON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it allowed the State to question the Defendant/Appellant regarding a drug addiction contrary to its own pretrial ruling under the theory that the “door was opened” during direct examination.
2. The trial court committed reversible error when it allowed the State to repeatedly assert that the Defendant/Appellant had been forced to submit to a buccal swab in violation of his Right to Remain Silent.
3. The trial court committed reversible error when it allowed the use of the controversial Washington Pattern Jury Instruction 4.01 including the bracketed “abiding belief in truth of the crime charged” language over the objection of both the State and the Defendant/Appellant.

II. ISSUES PRESENTED

1. Did the trial court exceed its discretion in permitting the State to inquire about a drug addiction because the “door had been opened”?
2. Did the trial court err when it permitted the state to inquire of the detective regarding acquiring a search warrant to obtain the defendant’s DNA?

3. Did the trial court err when it used the WPIC 4.01 with “abiding belief” language?

III. STATEMENT OF THE CASE

Ms. Breanne Snyder testified that the defendant was her ex-boyfriend. RP 35. She testified that she developed a drug addiction following an injury. RP 38. Shortly after leaving treatment, she began dating the defendant. RP 40. Ms. Snyder recalled that she and the defendant were still a couple on January 9, 2011. RP 41. She noted that she was withdrawing from opiates, she was tired, easy to anger, frustrated, and really upset. RP 41. Her pill of choice was an opiate, at approximately \$80 per pill. At the time of the robbery, Ms. Snyder had no money to spend on drugs. RP 41. She wanted to get more pills in order to calm her symptoms. RP 42. Ms. Snyder remembered talking with the defendant on the date in question with the goal of formulating a plan to figure out how to get either the pills or money for the pills. RP 43. Ms. Snyder and the defendant decided that they would have to rob someone in order to get money. RP 43. According to Ms. Snyder the defendant owned a white Tacoma truck with a manual shift. RP 44. Ms. Snyder stated that she did not know how to drive a manual transmission but was learning. RP 44.

Ms. Snyder could not remember how, but did remember ending up on Grand Avenue in Spokane. RP 45. She recalled being in the driver’s

seat and the defendant getting out of the vehicle. She described the defendant as wearing jeans, with Ms. Snyder's Old Navy sweats over the top, a white T-shirt, a black sweatshirt, a black ski mask, and black-type gloves. RP 45-46.

Ms. Snyder identified a BB gun that she indicated was used in the robbery at Baskin-Robbins. She identified the person using the BB gun as the defendant. RP 52. From the Toyota pickup truck, Ms. Snyder saw the defendant hold the gun up to the girl working inside the Baskin-Robbins. As Ms. Snyder maneuvered the pickup truck around behind the Baskin-Robbins in order to pick up the defendant, she saw what she described as two off-duty firefighters. She came to the conclusion that the two were firefighters because one of them had a firefighting sweatshirt on. RP 57. Ms. Snyder could not locate the defendant and continued to drive around the area. RP 57-58. Ms. Snyder finally spotted the defendant approximately 7 to 10 minutes after the robbery and he was wearing different clothing. His outer clothing had been removed. RP 58.

Ms. Snyder indicated that she pulled over to the side of the road and the defendant jumped into the truck. RP 58. He was out of breath. RP 58. She could not recall at what point she switched seats with the defendant but as they were sorting things out, she started hearing sirens coming from, what seemed to Ms. Snyder as, every direction. RP 59.

The defendant was described as being a little frustrated he got only \$75 from the robbery. RP 60. The defendant told Ms. Snyder that two men had chased him and that he had had to take off his outer clothes and leave them under a slanted board. RP 61.

Ms. Snyder testified that the money was spent on “OxyContin.” RP 61. According to her testimony, both Ms. Snyder and the defendant saw reports of the robbery on the news. RP 62. When asked if she had considered calling the police to report the events, she stated “no.” RP 62.

Ms. Sharron Callant was working in the Baskin-Robbins store on the date in question. RP 116. The store is located at 14th and Grand. RP 116. Ms. Callant testified that sometime between 7:00 and 7:30 p.m. on January 9, 2011, a man came into the store and started yelling at her. RP 118. He was waving a gun around and saying “Give me all the money in the store, give it all to me, give it to me right now.” RP 118. The person pointed the gun directly at her face. RP 119. The voice sounded very deep and very loud. RP 119. Ms. Callant testified that the man was “tall,” definitely taller than she was. RP 120. Ms. Callant is 5’5”. RP 120. She described the man as having jeans on, a dark black or blue sweatshirt with hood pulled up and a red stocking mask pulled down over his face. There were eye and mouth holes in the mask. RP 120.

Ms. Callant testified that she wanted to keep him calm so she walked him through each step that she took. RP 121. She opened the register and one at a time handed him chunks of bills. RP 121. She told the man “Here’s the twenties, here’s the tens, here’s the fives, here’s the ones.” RP 121. Ms. Callant thought she handed the person with the gun approximately \$140. RP 121. She thought that if she did not give the man the money he would probably shoot her. RP 123.

Mr. Clifford Graham testified that he was working as a bartender at Press Public House which is a bar near Sacred Heart Hospital. RP 131. Mr. Graham noticed a white Toyota pickup truck that had pulled up with a female sitting inside it. RP 132. Mr. Graham thought that was odd, but he continued his work of collecting glassware on the patio and then smoking a cigarette. RP 132. Mr. Graham saw a male come running down the hill, hop in the truck and take off. RP 132. Mr. Graham could not give a certain description of the male but thought that he was medium build, 5’8” to 6’ in height. RP 133. Shortly after the Toyota pickup departed, Mr. Graham remembered perhaps three or four Spokane Police Department cars racing up Grand Boulevard towards the Baskin-Robbins. RP 133-34. Mr. Graham could not identify either the male or the female in the Toyota.

Scott Coldiron testified that he was a fire Lieutenant for the City of Spokane. RP 139. Scott Coldiron recalled that on the date in question he

was having dinner in an establishment next to the Baskin-Robbins with his brother, girlfriend, and mother. Scott Coldiron's brother, Darrin, abruptly stood up and stated that it looked like the Baskin-Robbins was being robbed. RP 141. Darrin Coldiron ran out of the restaurant followed by Scott Coldiron. RP 141. Scott Coldiron testified that he saw an individual coming out of the Baskin-Robbins at a quick pace. RP 141. The individual turned right and went up the sidewalk at a run. RP 141. Scott Coldiron described the individual as a male approximately 5'9" and wearing a dark hoody. RP 142. Both of the Coldirons chased the individual. RP 142. At one point, Scott Coldiron decided to abandon the chase because the fleeing person had entered a brushy area and it was unknown whether the person was armed or might be a threat to him. Darrin had already returned to the Baskin-Robbins RP 144. Scott Coldiron noted that the individual was "very fast." RP 144. Scott Coldiron recalled seeing a white pickup that he thought might be a Toyota or Nissan pickup. RP 146. He noticed the pickup because it appeared that "they" were looking at him. RP 146. The actions of the pickup caused Scott Coldiron to think that the driver was attempting to pick somebody up. Scott Coldiron could not remember whether anyone other than the driver was in the vehicle but that the driver was female. RP 146.

Darrin Coldiron told the court that he worked for the Spokane Valley Fire Department as a firefighter. RP 154. Darrin Coldiron testified to a similar series of events as did his brother. RP 155-59. Darrin Coldiron recalled the person entering the Baskin-Robbins as wearing a hoody covering most of his face and moving very quickly. RP 156. Darrin Coldiron did not get an identification of the individual other than he was a thin, 5'9" person that Darrin Coldiron assumed was male. RP 156. Darrin Coldiron stated that he did not get a good enough look at the person to make an identification. RP 157.

Officer Joseph Dotson is employed by the Spokane Police Department. RP 160. Officer Dotson responded to the area of the robbery of the Baskin-Robbins and set up a perimeter. RP 163. Officer Dotson was advised that the suspect in the robbery was a male of unknown race wearing a red ski mask and a black sweatshirt. RP 164. Officer Dotson assisted in collecting evidence. RP 167. Officer Dotson described a set of garbage cans in a back alley located near the Baskin-Robbins. RP 167. In the courtroom, the officer was asked about exhibits and he recognized exhibit number three as being a pair of woolen gloves or mittens. RP 168. Officer Dotson identified a photograph of an Airsoft pistol. RP 174. There was also a red ski mask and an additional piece of clothing next to the mask. RP 174. The officer identified exhibit number seven as a sweatshirt

recovered from the alley. RP 176. Officer Dotson identified exhibit number two as a black-billed hat collected at the scene. RP 178. State's exhibit number four was identified as gray sweatpants that were recovered from the snowbank in the alley area. RP 179. State's exhibit number five was identified by Officer Dotson as the red ski mask recovered from the area. RP 179. The last exhibit admitted was an Airsoft pistol recovered from the area. RP 180.

Ms. Lisa Turpen was called to testify regarding DNA evidence in this case. Ms. Turpen indicated that she was a forensic scientist employed by the Washington State Patrol. RP 193. Ms. Turpen explained to the jury the various instruments used to test DNA and the procedures used in processing DNA evidence. RP 194-215. Ms. Turpen related that at the time she did the initial tests on the material submitted, there was no named suspect so she had no known reference sample. RP 215. Ms. Turpen was eventually supplied with a DNA sample from the defendant which she processed and compared to the profiles she had previously developed from the submitted materials. RP 223-225. Ms. Turpen testified that the defendant's DNA matched that of the DNA extracted from three separate pieces of evidence submitted for processing. RP 227.

Sergeant Brian Eckersley was a sergeant for the Spokane Police Department. RP 259. When the radio call came out regarding the robbery

at Baskin-Robbins, Sergeant Eckersley responded. RP 261. The Sergeant spoke with the victim of the robbery and took her statement. RP 262. The victim described the robber as a male about 5'8" to 5'9" with a thin build, about 140 pounds. RP 263. She thought that the male was in his twenties. She indicated that the robber wore a blue-hooded sweatshirt with pockets in the front and no zipper, and a red stocking mask that had eye and a mouth holes cut out. RP 264. The suspect was also wearing gloves. RP 264.

A K-9 unit responded to the scene but was unable to locate or capture the defendant. RP 292-301.

Spokane Detective Mark Burbridge became involved in this case when he was contacted by a prosecutor in regards to a "free talk" involving Breanne Snyder. RP 326. Detective Burbridge testified that at that point he had never heard of Ms. Snyder. RP 326. Detective Burbridge did not believe that Ms. Snyder was wanted or under investigation for the robbery at Baskin-Robbins. RP 332. When the detective first began speaking with Ms. Snyder, he thought that he would be working on a first-degree robbery. RP 334. Detective Burbridge prepared a report on the information he had received from Ms. Snyder and gave that report to Detective Marty Hill. RP 334-35.

Detective Marty Hill testified that when he was assigned this case there was no identification of the suspect in the robbery. RP 341. There were no fingerprints found on the firearm. RP 345. DNA analysis of the evidence showed a suspect profile of an unknown male. RP 347. Detective Hill was in the office when Detective Burbridge asked if anyone had a robbery that concerned a Baskin-Robbins. RP 348. Detectives Hill and Burbridge discussed the information and then Detective Hill knew that Detective Burbridge had spoken with someone directly involved in the robbery case. RP 348-49. From the information gathered from Detective Burbridge, Detective Hill was able to narrow down the robbery suspect to the defendant. RP 349. Detective Hill informed the prosecutor that he would want to obtain a sample of DNA from Mr. Robison. RP 350. Detective Hill filled out a search warrant request to obtain the defendant's DNA. RP 350. During Detective Hill's testimony, the prosecutor asked the detective if he could have forced the defendant to give him DNA without a search warrant. RP 350. Detective Hill replied that he could not. RP 350. Detective Hill stated that the search warrant was granted. RP 350. Detective Hill was asked if he was able to get a lawful search warrant in this case to collect DNA from Mr. Robison, and he replied that he was able to get the warrant. RP 351.

Detective Hill contacted the defendant's attorney advised him that the detective had a search warrant for a buccal swab and arrangements were made to meet and obtain the buccal swab. RP 351.

The defense began its case with testimony from the defendant. RP 371. The defendant testified to innocent explanations as to how his DNA got on the clothing samples. RP 374. He stated that he had no feelings for Ms. Snyder. RP 376. The defendant denied robbing the Baskin-Robbins on January 9, 2011. RP 377. On cross-examination, the defendant denied being a drug addict. RP 381. However the defendant did admit to using opiates. RP 381-82.

The defense called the defendant's mother, Ms. Karen Unser. RP 396. Ms. Unser testified that she kept a journal and that's how she knew that the defendant spent the night in his parents' home on January 9, 2011. RP 409.

Following deliberations the jury returned a verdict of guilty of first-degree robbery. CP 52. This appeal followed.

IV. ARGUMENT

A. THE DEFENDANT HAS NOT SHOWN A RECORD FOR THE ISSUE THAT THE TRIAL COURT ERRED BY PERMITTING INQUIRY OF THE DEFENDANT/APPELLANT REGARDING A DRUG ADDICTION.

The defendant makes multiple claims in his argument regarding pretrial rulings made by the trial court and how the State violated those

rulings. The defendant does not cite to the record for his claims pertaining to rulings from the trial court. The defendant simply makes a claim with no citation to the record and then proceeds to argue from alleged trial court rulings that appear nowhere in the record. For example, the defendant argues that the State (with the “collusion of the court”) violated an “argued and ruled upon motion....” Yet the defendant does not cite to the alleged “argued and ruled upon motion,” he simply argues as if his statement was fact. App. Br., 15. The defendant takes the same approach by claiming the trial court had already weighed the State’s arguments and found them “wanting.” App. Br., 15. The defendant does not point to the part of the record that supports this argument. App. Br., 15.

Assuming, *arguendo*, that there is some part of the record that is uncited and not apparent to the State, the following argument is presented in an effort to respond to what appears to be the defendant’s general argument.

The general drift of the defendant’s arguments center on the State’s questioning of the defendant (on cross-examination) and violating a pretrial ruling that apparently prohibited the State from arguing that the defendant was a “drug addict.” The defendant does not explain how broad or narrow the trial court’s alleged ruling might have been. In any event,

regardless of the nature of the alleged pretrial ruling, there is nothing in the record that shows that the State violated such a ruling.

Defense counsel objected to the line of questions asked by the State, but the trial court responded that the “door is opened.” RP 383. A trial court’s decision as to the scope of redirect examination and whether to admit or exclude evidence is within its wide discretion, and the courts will not reverse absent a manifest abuse of that discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); *State v. Gould*, 58 Wn.App. 175, 186, 791 P.2d 569 (1990).

The defendant did not make an argument about why or how the trial court’s ruling that “the door was opened” abused the trial court’s discretion. RP 382-83. Likewise, the defendant does not argue on appeal how the trial court violated its discretion in holding that the door had been opened.

This argument is without merit.

B. QUESTIONS REGARDING OBTAINING OF DNA SWABS WERE PROPER.

The defendant claims that the court violated the defendant’s right to remain silent and not to incriminate himself when the State asked the detective how he had obtained a sample of the defendant’s DNA. The defendant is correct that if the prosecutor had simply asked the defendant

if he refused to give a DNA sample, it probably would have been a violation of the defendant's constitutional rights. However, after taking the time to make a non-existent point, the defendant properly notes that the State *did not ask* the questions that would have violated the defendant's rights. According to the defendant, the prosecutor "skirted the issue." If the issue did not come up, it seems like a waste of time to argue it on appeal.

The defendant changes the direction of his argument and attacks one of the State's witnesses, Ms. Snyder. App. Br., 19. The defendant argues that Ms. Snyder's testimony was unreliable. The defendant makes the dubious claim that the DNA evidence just corroborated a "weak case." The defendant does not explain exactly how Ms. Snyder's testimony has anything to do with an alleged violation of the defendant's constitutional rights.

The defendant claims that repeated, overt references by the prosecutor to the defendant's refusal to voluntarily provide a DNA sample were a critical part of the State's case. What the defendant does not mention is that there were only four instances where the prosecutor asked Detective Hill about obtaining DNA from the defendant. RP 350-351. Further, the word "refused" was not used by either party. The State's line of questioning gave the jury a background for how the State obtained the

defendant's DNA. There are numerous instances of prosecutor's asking similar lines of questions to forestall a defense attack on the origin of the samples and any questions about the possibilities of the State using the wrong DNA. Chain of custody and contamination issues are commonly pursued by defendants.

The answer to the defendant's main argument, that the State was using nefarious techniques to bolster its case, is quite simple to answer: The prosecutor did not comment on the DNA search warrant issue in either his closing argument or in his rebuttal closing argument. Despite the defendant's attempts to make a mountain from a mole hill, the testimony does not support the defendant's position.

The defendant's arguments on this issue lack merit.

C. THE USE OF THE "ABIDING BELIEF" INSTRUCTION" WAS NOT ERROR.

The arguments raised by defendant on appeal have been raised and discussed many times before. The Washington State Supreme Court in *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), dealt with an "abiding belief" instruction by holding:

Without the last sentence, the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster. The addition of the last sentence does not diminish the definition of reasonable doubt given in the first two sentences, but neither does it add anything of substance to WPIC 4.01. WPIC 4.01 adequately defines reasonable

doubt. Addition of the last sentence was unnecessary but was not an error.

Id. at 658.

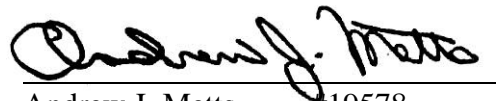
As an aside, the defendant claims that the State objected to the giving of the contested instruction. App. Br., 22. The record does not support this claim. RP 426.

V. CONCLUSION

For the reasons stated above, the State respectfully requests that the conviction be affirmed.

Dated this 18 day of September, 2014.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 18, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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9/18/2014

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